

Rockland D. Johnson

Name, Prisoner ID #

419056P.O. Box 220Address Hammy, Ok. 74035

FILED
 SEP 17 2004
 Phil Lombardi, Clerk
 U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF OKLAHOMA

Rockland D. Johnson Petitioner
 (Full Name)

v.

Marty Sirmans, Respondent
 (Name of Warden, Superintendent,
 Jailor or authorized person having
 custody of petitioner)

04C V 724P (C)

Case No. _____

(To be supplied
 by the Clerk)

PETITION FOR A WRIT OF
 HABEAS CORPUS PURSUANT
 TO 28 U.S.C. §2254 BY A
 PERSON IN STATE CUSTODY

NOTE: If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment of conviction was entered. If the petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.

CONVICTION UNDER ATTACK

- 1) Name and location of the court which entered the judgment of conviction under attack Tulsa County District Court; Tulsa, Okla.
- 2) Date judgment of conviction was entered May 24, 2002
- 3) Case number CF- 2001-4067
- 4) Length and terms of sentence Two consecutive life sentences
- 5) Are you presently serving a sentence imposed for a conviction other than the conviction under attack in this motion? Yes ☐ No ☒
- 6) Nature of the offense involved (all counts) Two (2) counts of First Degree Murder

7) What was your plea? (check one)

a) Not Guilty ☒ b) Guilty ☐ c) Nolo Contendere ☐

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

8) If you entered a plea of guilty pursuant to a plea bargain, state the terms and conditions of the agreement: N/A

9) Kind of trial (check one)

a) Jury Trial ☒ b) Judge without a Jury ☐

10) Did you testify at trial (if any)? Yes ☐ No ☒

Direct Appeal

11) Did you appeal the judgment of conviction? Yes ☒ No ☐

12) If you did appeal, state the name and location of the court where the appeal was filed, the result, the case number and the date of the court's decision (or attach a copy of the court's opinion or order) Okla. Court of Criminal Appeals; Okla. City,

Okla.; Affirmed; F-2002-685; June 20, 2003.

13) If you did not appeal, explain briefly why you did not N/A

a) Did you seek permission to file a late appeal? Yes ☐ No ☒

Post-conviction Proceedings

14) Other than a Direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ☒ No ☐

15) If your answer to 14 was "Yes", give the following information

a) First petition, application or motion.

1) Name of court Tulsa County District Court

2) Nature of proceeding Post-Conviction / Habeas state

3) Grounds raised Same as raised in this Federal Habeas Petition.

- 4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☐ ? Pending
- 5) Result Pending
- 6) Date of result Pending
- 7) Did you appeal the result to the highest state court having jurisdiction? Yes ☐ No ☐. If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order) Pending. I will file notice of intent to Appeal within ten (10) days of receipt of unfavorable order and file Petition in Error with Brief in Support within thirty days of Order.
- 8) If you did not appeal, briefly explain why you did not Pending

b) As to any second petition, application or motion.

- 1) Name of court N/A
- 2) Nature of proceeding N/A
- 3) Grounds raised N/A
- 4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☐
- 5) Result N/A
- 6) Date of result N/A
- 7) Did you appeal the result to the highest state court having jurisdiction? Yes ☐ No ☐. If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order) N/A
- 8) If you did not appeal, briefly explain why you did not N/A

c) As to any third petition, application or motion.

- 1) Name of court N/A

- 2) Nature of proceeding N/A
- 3) Grounds raised N/A
- 4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☐
- 5) Result N/A
- 6) Date of result N/A
- 7) Did you appeal the result to the highest state court having jurisdiction? Yes ☐ No ☐. If you did appeal, give the name of the court where the appeal was filed, the result, the case number, citation and date of the court's decision (or attach a copy of the court's opinion or order) N/A
- 8) If you did not appeal, briefly explain why you did not N/A

- 16) State **concisely** every ground on which you claim that you are being unlawfully held. Summarize **briefly** the **facts** supporting each ground. If necessary, you may attach up to two extra pages stating additional grounds or supporting facts. You should raise in this petition all available grounds for relief which relate to the conviction under attack.

CAUTION

Before proceeding in a federal court, you are required to exhaust the remedies available to you in the state courts as to each ground on which you request action by the federal court.

A)(1) **Ground One:** Denied access to state Judicial forum for fair adjudication of independent Appellate counsel claim:

- (2) Supporting facts : (Without citing legal authority or argument state briefly the facts which support your claim) state court decisions deny Johnson access to valid state post conviction and state Habeas Court in violation of his guaranteed Fourteenth Amendment right to due process. See Brief in Support attached

(3) State^{ment} of Exhaustion of State Remedies as to Ground One: _____

Claim pending in state Court

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes ☐ No ☒

(b) If you did not raise this issue in your Direct appeal, explain briefly why you did not Factual basis not ripe for review.

Or. Ineffective Appellate Counsel

Post Conviction Proceedings

(c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if known), the result and the date of the court's decision
Post-Conviction / habeas Corpus Petition filed in Tulsa County District Court under CF-2001-4067.

Pending

(e) Did you receive an evidentiary hearing on your motion or petition? Yes ☐ No ☐ Pending. Requested Evidentiary Hearing in state court and Federal Court.

(f) Did you appeal from the denial of your motion or petition? Yes ☐ No ☐ Pending. I will Appeal

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes ☐ No ☐, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order) Pending

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain
State Collateral Petition Pending in state Court.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue No remedy in state court

B)(1) Ground Two: First Direct Appeal not Adjudicated in accord with due process at law because I was denied constitutionally effective assistance of Appellate Counsel.

- (2) Supporting facts : (Without citing legal authority or argument state briefly the facts which support your claim) Appellate Counsel's performance was constitutionally deficient in omitting, and failing to seek remand to develop factual basis of claims. See Brief in Support attached at Ground two.

(3) Statement of Exhaustion of State Remedies as to Ground One: ^{Two}_____

Direct Appeal

- (a) If you appealed from the judgment of conviction did you raise this issue? Yes ☒ No ☐ ~~Not~~ Counsel omitted this claim on Pending Direct Appeal.
- (b) If you did not raise this issue in your Direct appeal, explain briefly why you did not ~~Not~~ Constitutionally deficient performance of Appellate Counsel

Post conviction Proceedings

- (c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☒ No ☐.
- (d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if known), the result and the date of the court's decision Post-Conviction / Habeas Corpus; Tulsa County District Court; CF-2001-4067, Pending.
- (e) Did you receive an evidentiary hearing on your motion or petition? Yes ☐ No ☐ Pending, Requested Hearing
- (f) Did you appeal from the denial of your motion or petition? Yes ☐ No ☐ I will
- (g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes ☐ No ☐, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order) Pending

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain

Pending

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue _____

C)(1) Ground Three: _____

(2) Supporting facts : (Without citing legal authority or argument state briefly the facts which support your claim) _____

(3) Statement of Exhaustion of State Remedies as to Ground One: ^{Three}_____

Direct Appeal

(a) If you appealed from the judgment of conviction did you raise this issue? Yes ☐ No ☐.

(b) If you did not raise this issue in your Direct appeal, explain briefly why you did not _____

Post-Conviction Proceedings

c) Did you raise this issue by means of a post-conviction motion or petition for habeas corpus in a state trial court? Yes ☐ No ☐.

(d) If your answer to (c) is "Yes", state the type of motion or petition, the name and location of the court where the motion or petition was filed, the case number (if known), the result and the date of the court's decision

(e) Did you receive an evidentiary hearing on your motion or petition?
Yes ☐ No ☐

(f) Did you appeal from the denial of our motion or petition?
Yes ☐ No ☐

(g) If your answer to (f) is "Yes", state whether this issue was raised in the appeal, Yes ☐ No ☐, and state the name and location of the court where the appeal was filed, the case number and the date of the court's decision (or attach a copy of the court's opinion or order) _____

(h) If your answer to questions (e), (f) or (g) is "No", briefly explain.

Other Remedies

(i) Describe all other procedures (such as habeas corpus in the state supreme court, administrative remedies, etc.) you have used to exhaust your state remedies as to the issue N/A

- 17) Have all grounds for relief raised in this petition been presented to the highest state court having jurisdiction? Yes ☐ No ☒ Pending
- 18) If you have answered "No" to question 17, state which grounds have not been so presented and briefly give your reason(s) for not presenting them None
Pending in State District Court
- 19) If any of the grounds listed in this petition, were not previously presented in any other court, state or federal, state **briefly** what grounds were not so presented, and give your reasons for not presenting them N/A
-
-
- 20) Have you previously filed any type of petition, application or motion in a federal court regarding the conviction under attack? Yes ☐ No ☒ If "Yes", state the location of the court, the type of proceeding, the issues raised, the result and the

date of the court decision for each petition, application, or motion filed _____

- 21) Do you have any petition, application, motion or appeal now pending in any court, either state or federal, regarding the conviction under attack? Yes ☒ No ☐. If "Yes", state the name of the court, case file number (if known), and the nature of proceedings Tulsa County, D.C.; CF-2001-4067; P.C. / Habeas

(a) At preliminary hearing _____

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding Tulsa County CF-2001-4067, Post Convic. / Habeas App.

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

- 23) Were you sentenced on more than one count of an indictment or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐.

- 24) Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ☒ No ☐. and no. consecutive sentence

(a) If so, give name and location of court which imposed sentence to be served in the future Same Court consecutive sentence

(b) And give date and length of service to be served in the future Life

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ☒ No ☐.

SECOND OR SUCCESSIVE APPLICATIONS

This court is required to dismiss any claim presented in a second or successive petition that the federal court of appeals has authorized to be filed unless the applicant shows that each claim satisfies the requirements of 28 U.S.C. §2244, as amended by Title I of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No 104-132, §106, 110 Stat. 1214 (April 24, 1996). *Not applicable. Initial collateral attack*

25) If you are raising a claim which you have not presented in prior application have you obtained an order from the United States Court of Appeals for the Tenth Circuit authorizing this district court to consider the application? Yes ☐ No ☒ (Please attach a copy of the order)

Wherefore, petitioner prays that the court grant him such relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

✓ *Rockland Johnson*
Original Signature of Petitioner

(Attorney's full address and telephone number)

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares (or certifies, verifies, or states) under penalty of perjury that he is the plaintiff in the above action, that he has read the above complaint and that the information contained therein is true and correct. 28 U.S.C. §1746. 18 U.S.C. §1621.

Executed at P.O. Box 220, Hominy Ok. on 09/16/04
(Location) (Date)

✓ *Rockland Johnson*
Original Signature

GROUND ONE

THAT JOHNSON IS DENIED FAIR ADJUDICATION OF THE LEGALITY OF HIS DETENTION UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES BECAUSE THE OKLAHOMA COURTS DENY HIM ACCESS TO A COURT THAT WOULD BE ABLE TO HEAR AND DETERMINE THE SUBSTANTIVE MERITS OF HIS INDEPENDANT CONSTITUTIONAL CLAIM THAT "JOHNSON'S FIRST DIRECT APPEAL OF RIGHT WAS NOT ADJUDICATED IN ACCORD WITH DUE PROCESS OF LAW BECAUSE HE WAS DENIED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE ON DIRECT APPEAL IN VIOLATION OF HIS FOURTEENTH AMENDMENT GUARANTEED RIGHT TO DUE PROCESS:

The Constitution was written by wise men who sought to protect the people from government harrassment and oppression who feared alike the King and the King's Judges; and that a failure to place a due process requirement on the unbounded authority in any group of politically elected Judges would unquestionably render our Nation a government of men, and not a government of laws. The Constitutional prohibition against the State's efforts to deprive a state prisoner from access to a Federal Court's Habeas Corpus Jurisdiction is grounded on the Due Process Clause of the Fourteenth Amendment. Ex parte Hull 312 U.S. 546, 61 S.Ct. 640 (1941). "It is fundamental that access of prisoners to the Courts for the purpose of presenting their complaints may not be denied or [obstructed]". Johnson v. Avery 393 U.S. at 485, 89 S.Ct. at 849 (1969).

Johnson's argument that the State deny him fair adjudication of the legality of his detention under the Constitution and Laws of the United States involve his allegation that since under Oklahoma Law he never had any right to raise his independant ineffective assistance of Appellate Court claim in any State Judicial proceeding in the first instance because it is both obvious and pre-ordained that Oklahoma Courts will summarily dismiss Johnson's independant Appellate Counsel dominated fundamental fairness constitutional claims on procedural grounds previously determined by Federal Court to be inadequate to preclude Federal Habeas Merti Review of his independant ineffective assistance of Appellate Counsel claim, the State has denied Johnson Due Process of law because he never could have gotten Oklahoma Courts to adjudicate the merits of his Murray v. Carrier 106 S.Ct. 2646, Appellate Counsel Claim in the first instance. Also see Smith v. Murray 477 U.S. 535-536 (1986). Under Oklahoma law Johnson is

denied Due Process of Law irregardless of whether he dominates his claim as Ineffective Assistance of Appellate Counsel, dominates his Ineffectiveness claim as cause, or supplements his ineffectiveness claim with a colorable showing of actual innocence.

The State Court decisions in *Jones v. State* 704 P.2d 1138-39, and its progeny *McCracken* 946 P.2d 676; *Neill* 943 P.2d 148, provide that under Oklahoma law, a petitioner who fails to raise a claim on his First Direct Appeal of Right and does not demonstrate sufficient reason for such a failure is barred from obtaining relief on that claim in any subsequent state collateral post-conviction / habeas proceeding. *Miller v. champion* 161 F.3d 1249 (10th Cir. 1998). Also see *State v. ex rel. Coats v. Hunter* 580 P.2d 158, 159 (Okla.Cr. 1978) (the sole method of challenging a conviction is under the Post-Conviction Act); *Berry hill v. State* 43 P.2d 410, 412 (Okla.Cr.2000) ("Habeas Corpus is not a substitute for a direct appeal. Challenges to the Judgment and Sentence must be made through post-conviction procedures in the proper District Court). Moreover, the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals' Procedural Court Rules' requirement that state prisoner's take an appeal from Order denying Habeas Relief filed in county of imprisonment, [WHERE THE STATE PRISONER HAS NO RIGHT TO SEEK HABEAS RELIEF CHALLENGING JUDGMENT], themselves prevent the exercise of State Habeas Original Jurisdiction conferred on the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeal by 12 O.S. sec. 1333.

Under the language of 28 U.S.C. 2254(b)(3)(c), a state petitioner "shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has [THE RIGHT UNDER THE LAW OF THE STATE] to raise, by any available procedure, the question presented". Furthermore, 28 U.S.C. sec. 2254 (B)(1)(A-B) states that a prisoner's federal habeas petition "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, [or] that there is an absence of available state corrective process or the exiatance of circumstances rendering such process ineffective to protect the rights of the prisoner".

Petitioner Johnson never could have gotten the merits of his *Murray v. Carrier* independant ineffective assistance of Appellate

counsel claims reviewed by the Oklahoma state courts absent a direct appeal asserting such claims. While its true that Johnson took a Direct Appeal from his convictions and sentences, because his appointed counsel's performance was constitutionally deficient in omitting from his Brief on Direct Appeal fundamental fairness due process claims that would have resulted in modification or reversal on Direct Appeal, Johnson [NEVER HAD "THE RIGHT UNDER THE LAWS OF OKLAHOMA"] to argue his independant ineffective assistance of Appellate Counsel Claim in any state collateral proceeding. Just as it was futile to attempt to force Appellate Counsel to raise fundamental fairness due process & Equal Protection claims on his first Direct Appeal of right, it is futile to attempt to force Oklahoma Courts to adjudicate the merits of his claims in an initial post-conviction / habeas state process because it is both obvious and pre-ordained that Oklahoma Courts will summarily dismiss on procedural grounds. Mitchell v. State 934 P.2d 346. Moreover, there is still an "absence of state corrective process" because Oklahoma Courts' refusal to entertain the substantive merits of Johnson's Ineffectiveness Appellate Counsel claims under these circumstances prove that Oklahoma Law is ineffective to protect Johnson's substantive rights under the Constitution and Laws of the United States.

The Fourteenth Amendment, section 1, has long provided that "nor shall any state deprive any person of his life, LIBERTY, or property without due process of law". Section 5 of the Fourteenth Amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article". The Habeas Corpus Act of 1867 was enacted by Congress pursuant to the power vested in Congress by section 5 of the Fourteenth Amendment. The doctrines of comity and procedural default simply have no application in the context of Johnson's allegation that he is denied state process in violation of the Fourteenth Amendment. Petitioner Johnson has a legitimate expectation that his Right of Access to the Habeas Corpus Jurisdiction, vested in all Federal Courts by the Act of 1867, will be enforced pursuant to the Fourteenth Amendment. Petitioner Johnson's right to counsel for his defense, developed through the Due Process Clause of the Fifth Amendment, Powell v. Ala. 287 U.S. 69, was not recognized under the Sixth Amendment and enforced pursuant to the Fourteenth Amendment until

Gideon v. Wainwright 372 U.S. 335. Johnson's Fourteenth Amendment Fundamental Fairness Due process right to enforcement of his 28 U.S.C. sec. 2254 Federal Statutory right to fair adjudication of the legality of his detention under the constitution and laws of the United States effectively eliminate any requirement of an evidentiary hearing in either state or federal court. The Supreme Court simply established the principled rule that "THE FEDERAL CLAIM ALLEGED IN A STATE PETITION MUST BE ASSUMED TO BE TRUE AND THAT THE STATE'S FOURTEENTH AMENDMENT VIOLATION MUST BE HELD TO BE ESTABLISHED IF IT IS DETERMINED THAT A STATE HAS DEPRIVED THE PETITIONER OF ACCESS TO A STATE COURT THAT WOULD BE ABLE TO HEAR AND DETERMINE THE FEDERAL HABEAS CLAIM WHICH, IF TRUE, WOULD ENTITLE THE STATE PRISONER TO FEDERAL HABEAS CORPUS RELIEF". Williams v. Kaiser 323 U.S. 471, 65 S.Ct. 363 (1945). Bartone v. U.S. 84 S.Ct. 21 (1963).

GROUND TWO

THAT THROUGH NO FAULT OF HIS OWN, JOHNSON'S FIRST DIRECT APPEAL OF RIGHT IN CF-01-4067 WAS NOT ADJUDICATED IN ACCORD WITH DUE PROCESS OF LAW BECAUSE THE DENIAL OF JOHNSON'S FOURTEENTH AMENDMENT GUARANTEED RIGHT TO CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CAUSED THE OMISSION OF ENTIRELY VALID FIFTH & SIXTH AMENDMENT FUNDAMENTAL FAIRNESS CONSTITUTIONAL CLAIMS ON DIRECT APPEAL:

In Evitts v. Lucey 469 U.S. 387, 105 S.Ct. 836 (1985), the Supreme Court held that "A first Appeal of Right is not adjudicated in accord with Due Process of Law if the appellant does not have the effective assistance of an attorney". Although Strickland v. Washington 466 U.S. at 687, 104 S.Ct. at 2064 (1984), set forth the constitutional standard for determining the effectiveness of Trial Counsel, Federal Courts apply this same [two prong] standard in assessing the effectiveness of Appellate Counsel. Smith v. Murray 477 U.S. 535-36, 106 S.Ct. 2661 (1986); U.S. v. Cook 45 F.3d 388 (10th Cir. 1995). A defendant may establish cause for his procedural default of his claims on Direct Appeal by showing that he received ineffective assistance of counsel for his defense in violation of the Sixth and the Fourteenth Amendment. Murray v. Carrier 106 S.Ct. 2639 (1986).

[A] Johnson's GROUND TWO (2) claim that his first Direct Appeal of Right was not adjudicated in accord with due process of law first involve his allegation that he was denied constitutionally effective

assistance of counsel for his defense because his Appellate counsel omitted from Johnson's first Direct Appeal of Right his claim that "TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL WHEN FAILING TO FILE MOTION SEEKING DISMISSAL OF CHARGES BASED ON ALLEGATION THAT 21 O.S. sec. 11 and the DUE PROCESS CLAUSE PRECLUDED THE STATE FROM HAILING JOHNSON INTO COURT TO ANSWER CHARGES". Okla.Consti.Art. II, secs. 7,10, and 20; 22 O.S. sec. 504.1(B) and sec. 508; 21 O.S. sec. 11. Blackledge v. Perry 417 U.S. 21, 94 S.Ct. 2098 (1974). Jackson v. Denno 84 S.Ct. 1786. Burks v. U.S. 98 S.Ct. 2141 (1978). Johnson request evidentiary hearing opportunity to develop the factual basis of this allegation. Keeney v. Tamayo-Rayes 504 U.S. 1, 112 S.Ct. 1715 (1992).

[B] Johnson's GROUND TWO (2) claim that his first Direct Appeal of Right was not adjudicated in accord with Due Process of Law also involve his allegation that he was denied constitutionally effective assistance of counsel for his defense because his Appellate counsel omitted from Johnson's first Direct Appeal of Right his claim that "TRIAL COUNSEL RENDERED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE WHEN FAILING TO FILE MOTION SEEKING JURY DETERMINATION OF WHETHER [BOTH] MINOR AND EATON WERE ACCOMPLICES AND SEEKING ACCOMPLICE INSTRUCTIONS". Johnson request evidentiary hearing opportunity to develop the factual basis of this allegation.

[C] Third, Johnson's GROUND TWO (2) claim involve his allegation that he was denied constitutionally effective assistance of counsel on his first Direct Appeal of Right because Johnson's plea of not guilty at Trial being premised upon alibi defense, Appellate Counsel's conceding guilt when raising accomplice claim on Appeal itself created a conflict of interest. Osborn v. Shillinger 861 F.2d at 629 (10th Cir.1988). Petitioner Johnson request an evidentiary hearing opportunity to develop the factual basis of this allegation. Cuyler v. Sullivan 446 U.S. 335 (1980). [Failure to consult on Appeal proves adverse affect].

[D] Finally, Johnson's GROUND TWO (2) claim involve his allegation that he was denied constitutionally effective assistance of counsel because counsel appointed him for his defense on his first Direct Appeal of Right rendered constitutionally ineffective assistance when failing to file Appellate Rule 3.11 Motion seeking Remand for Eviden-

tiary Hearing for the purpose of developing factual basis of ineffective assistance of Trial Counsel claim. 22 O.S. Ch. 18, App.Rul. 3.11. IN re Cannon 351 P.2d 756; Okla.Consti.Art. II, secs. 7,10, and 20.

WHEREFORE, the RELIEF SOUGHT herein is an Evidentiary Hearing Opportunity in this Judicial Forum to develop the factual basis of his allegations supporting his Ineffective Assistance of Appellate Counsel claim.

Rockland Johnson

Rockland Johnson 28 U.S.C. 1746
P.O. Box 220
Hominy, Okla. 74035

A-F-F-I-D-A-V-I-T

All statements and allegations in support of my INeffectiveness of Counsel claim are true and correct and sworn under penalty of perjury.

That unless the Court decide the substantive merits of my Federal Habeas Claim I am denied access to a State Judicial Forum for fair adjudication of the constitutionality of my detention under the constitution and laws of the United State

Subscribed and Sworn to before me this 16th day of September 2004.

My comm. exp. _____ Notary Norma Bullock.

